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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

CHRISTINE WILSON and MARGARET JOYNER,
Petitioners,
vs.
BEATRICE FUHRHOP, GERTRUDE AUSTIN, WILLIAM S. WILSON et al.,
Respondents.
No. 747.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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REFERENCE TO OFFICIAL REPORT OF THE OPINION DELIVERED IN THE COURT BELOW.

The opinion and judgment of the Supreme Court of the State of Illinois in the instant case is reported as **Beatrice Fuhrhop v. Gertrude Austin et al., Appellants (Christine Wilson et al., Appellees)**, 385 Ill. 149, 52 N. E. (2d) 267.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The grounds on which petitioners assert that this Court has jurisdiction are (a) that the aforesaid judgment of the Supreme Court of Illinois in refusing to recognize the legitimate status accorded to petitioners by the statute of Arkansas (Pope's Dig., Ark. Stat. 1937, Sec. 4342) in determining the devolution of realty situated in Illinois denies petitioners rights and privileges, claimed and set up by them under the "full faith and credit" clause of Article IV, Section 1 of the Federal Constitution, and (b) therefore it is claimed by petitioners that this Court has appellate jurisdiction with respect to said judgment, under Section 344 (b), U. S. C. A., Title 28, declaring that it shall be competent for the Supreme Court of the United States, by certiorari, to review any cause wherein a final judgment has been rendered by the highest court of a state in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution.

STATEMENT OF THE CASE.

Respondents deem it necessary to supplement petitioners' statement of the case or matter involved (Petitioners' Petition for Writ of Certiorari and Brief, pp. 2-5), by stating the law of Illinois relating to the legitimation of illegitimate issue of a void marriage, by making a more comprehensive statement of the contentions made by these respondents in the case of **Beatrice Fuhrhop v. Gertrude Austin et al., Appellants (Christine Wilson et al., Appellees)**, 385 Ill. 149, 52 N. E. (2d) 267, and by stating the **decision** of the Supreme Court of Illinois in that case.

> "The only statute in Illinois which undertakes to legitimatize the illegitimate issue of a void marriage

was the act of June 26, 1923 (Ill. Rev. Stat. 1941, Chap. 89, par. 17a), which reads as follows:

> " 'Whenever persons attempt or have attempted to contract and be joined in marriage, and some form of marriage ceremony recognized by law has been performed in apparent compliance with the law in relation to marriage, and, pursuant to such attempt to contract and be joined in marriage, cohabit or have cohabited together as husband and wife, and there is issue born after the taking effect of this Act as a result of such cohabitation, such issue is hereby made legitimate and may take the name of the father, though such attemped marriage is declared void or might be declared void, for any reason' " (Rec. 43).

In the Supreme Court of Illinois these respondents contended:

> "1. That under the Illinois statutes the appellees are deemed illegitimate and cannot inherit an interest in land in Illinois through their father.
>
> "2. That descent and heirship of real estate are exclusively governed by the laws of the state of the situs of the real estate and no person can take except those who are recognized as heirs by the laws of that state.
>
> "3. That the law of Arkansas has no application to the instant case since the Arkansas law is in conflict with the Illinois law on the subject and contrary to the public policy of Illinois.
>
> "4. The full-faith-and-credit clause of the Constitution does not require the Illinois courts to apply the law of Arkansas where there is a conflict and the Arkansas law is contrary to the public policy of Illinois" (Rec. 42-43).

The **decision** of the Supreme Court of Illinois was that:

> "Under the stipulation of facts it is shown that both the appellees were born prior to June 26, 1923.

The common law is in force in Illinois until changed by statute" (Rec. 44).

"There is definitely a conflict between the Arkansas law and the Illinois law. Section 4342, Pope's Digest of Arkansas Statutes 1937, says that all issue of void marriages, regardless of date of birth, shall be deemed legitimate, whereas in Illinois, as to children born prior to 1923, their status of legitimacy is to be determined by the common law, which declares that all issue of a void marriage are deemed illegitimate" (Rec. 46).

"The full-faith-and-credit clause of the Federal Constitution does not require the Illinois courts to apply the Arkansas law in a case determining the descent of real estate where it is in conflict with the Illinois law or the public policy of the state" (Rec. 47).

SUMMARY OF ARGUMENT.

The Supreme Court of Illinois in **Beatrice Fuhrhop v. Gertrude Austin et al., Appellants (Christine Wilson et al., Appellees)**, 385 Ill. 149, 52 N. E. (2d) 267, did not decide a federal question of substance not theretofore determined by this Court. The decision of the Supreme Court of Illinois on the federal question involved is in accord with applicable decisions of this Court. Illinois is the "sole mistress of the devolution of" Illinois "land by descent." The full-faith-and-credit clause of Article IV, Section 1, of the Federal Constitution does not require the Illinois courts to recognize the legitimate status accorded petitioners by the statute of Arkansas (Pope's Dig., Ark. Stat. 1937, Sec. 4342) in determining the devolution of land situated in Illinois, particularly, where the Arkansas statute relating to the legitimation of the issue of void marriages is in conflict with the Illinois law and the public policy of the State of Illinois covering the same subject.

ARGUMENT.

A review of a state court decision on writ of certiorari is not a matter of right, but of sound judicial discretion. The Supreme Court of Illinois in **Beatrice Fuhrhop v. Gertrude Austin et al.**, 385 Ill. 149, 52 N. E. (2d) 267, decided that the descent of real property is governed by the law of the situs, and that the full-faith-and-credit clause of the Federal Constitution does not require the courts of Illinois to recognize the legitimate status accorded to petitioners (title claimants to Illinois land) by an Arkansas statute in determining the descent of real estate situated in Illinois where the Arkansas statute is in conflict with the law or public policy of the State of Illinois. That decision is in full accord with applicable decisions of this Court. Olmsted v. Olmsted, 216 U. S. 386, 54 L. Ed. 530, infra; Fall v. Eastin, 215 U. S. 1, 54 L. Ed. 65; Hood v. McGehee, 237 U. S. 611, 59 L. Ed. 1144.

The full-faith-and-credit clause of Article IV, Section 1, of the Federal Constitution, does not insure "unlimited extraterritorial recognition of all statutes or of any statute under all circumstances." Klaxon Company v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477 (1941). Any other construction of the full-faith-and-credit clause "would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot in its own." Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 547, 79 L. Ed. 1052 (1935).

The adjudicated cases disclose a settled principle of law to the effect that where, as here, there obtains in the state of the forum a law or a public policy, and the governmental interests of that state in the persons, property, or events in the state involved in the litigation outweighs the governmental interests of the foreign state for whose

statute recognition is sought, the refusal of the courts of the forum to give effect to the right under the foreign statute does not constitute a denial of full faith and credit to that statute. In such a situation the state of the forum is at liberty to refuse to give effect to the law of a foreign state opposed to its own law or public policy. National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. Ed. 823 (1904); Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 72 L. Ed. 277 (1927).

In appraising the governmental interests of each jurisdiction where there is a conflict between the law of the forum and a foreign state, the Court has held in cases involving the devolution of real estate that the weight of governmental interest lies in the state where the land is situated.

In **Jones v. Jones,** 234 U. S. 615, 618, 58 L. Ed. 1500, 1503 (1914), the Court said:

> "Inheritance is governed by the lex rei sitae. It is not a natural or absolute right, but the creation of statute law. If one claim the right to succeed to the real property of another as heir, and his right is denied because he must trace his pedigree or title to or through an alien, a bastard, or a slave, the question is one to be determined by the local law. Cope v. Cope, 137 U. S. 682, 34 L. Ed. 832, 11 Sup. Ct. Rep. 222; Levy v. M'Cartee, supra; Blythe v. Hickley, 180 U. S. 333, 45 L. Ed. 557, 21 Sup. Ct. Rep. 390."

Olmsted v. Olmsted, 216 U. S. 386, l. c. 392, 393, 394, 54 L. Ed. 530, l. c. 533-534 (1910), is apposite on the point under discussion. That case originated in the state courts of New York where a suit was instituted for partition of New York real estate devised under the last will and testament of one Silas Olmsted. It appeared in the Olmsted case that Silas Olmsted, resident of the State of New York, died in 1874, leaving a will devising certain real estate

situated in New York to his son, Benjamin F. Olmsted, with a remainder over to the "lawful issue" of the said Benjamin. In 1850, Benjamin F. Olmsted, then a resident of New York, married Mary Jane Olmsted, of the State of New York, and resided with her in that state until January, 1870. The children of the New York marriage were made defendants in the partition suit. In the year 1874, without obtaining a divorce from his first wife, Benjamin F. Olmsted went through a marriage ceremony in New Jersey with Sarah Louise Welchman. Two children, John H. and William H. Olmsted, who were plaintiffs in the partition suit, were born of the attempted marriage in New Jersey. In 1880, Benjamin F. Olmsted and Sarah Louise Welchman, with their two children, went to the State of Michigan to reside. In 1882 Benjamin F. Olmsted was granted a divorce from his first wife, Mary Jane Olmsted, in accordance with the laws of Michigan. Shortly thereafter and on August 22, 1882, Benjamin F. Olmsted and Sarah Louise Welchman were married in the State of Michigan. A statute was enacted in the State of Michigan in 1881 providing that children born out of wedlock became legitimate upon the subsequent marriage of their parents. A New York statute legitimatized children born out of wedlock by subsequent marriage of the parents, but also provided that an estate vested before the marriage of the parents of such children shall not be divested by reason of such children being legitimatized. Benjamin F. Olmsted died July 16, 1905. Plaintiffs, John H. and William H. Olmsted, children of Benjamin's marriage with Sarah Louise Welchman, claimed the right to participate equally with children of Benjamin F. Olmsted and Mary Jane Olmsted, as "lawful issue" of Benjamin, in the real estate located in New York. The plaintiffs bottomed their claim of equal participation upon the proposition that the full-faith-and-credit clause of the Federal Constitution required the New York courts to give effect to the Michigan

statute aforesaid. The New York courts rejected plaintiff's contention and denied their claim to a share in the New York real estate. 190 N. Y. 458, 83 N. E. 569; 118 App. Div. 69, 102 N. Y. Supp. 1019. This Court, in affirming the judgment and decision of the New York courts, said inter alia:

> "The question, therefore, is as to the title to real estate in the state of New York. Does the full-faith-and-credit clause of the Federal Constitution require that effect be given to the Michigan Act of 1881 under the circumstances which we have detailed?
>
> * * * * * * *
>
> "We think there is nothing in the due-faith-and-credit clause which requires the courts of New York to give the effect contended for to the Michigan statute. The Legislature of Michigan had no power to pass an act which would affect the transmission of title to lands located in the State of New York. No more had it power to legislate concerning the titles to lands in New York than the courts of Michigan, by their judgments, would have authority to adjudicate such rights.
>
> * * * * * * *
>
> "We hold that there is nothing in the Federal Constitution requiring the courts of the State of New York to give force and effect to the statute of the State of Michigan, so as to control the devolution of title to lands in New York."

Frey et al. v. Nielson et al., 99 N. J. Eq. 135, 132 Atl. 765, 766 (1926), is of significance in that it shows that other state courts have taken the same view as the Illinois court on the point as to whether the "full-faith-and-credit clause" of the Federal Constitution and the decisions of this Court require a court of the forum to recognize the legitimate status accorded to claimants of land situated in

the state of the forum by a statute of a sister state in determining the devolution of real estate located in the state of the forum. In the **Frey** case the Court said:

> "This is a suit to determine whether Edith Nielson, a child of Christian Nielson, adopted under the law of the State of New York, can inherit land in the State of New Jersey. Two questions are propounded by counsel: First, assuming the regularity of the adoption in New York, can this child inherit; second, if she can, are the proceedings regular under the New York statutes?
>
> "First. Can a child adopted in New York inherit land in New Jersey?
>
> "It has been suggested that, under the so-called full-faith-and-credit clause of the United States Constitution (Section 1, Art. IV), the courts of the state are bound to give effect to adoption proceedings of another state. This, however, has been definitely settled by the Supreme Court of the United States in Hood v. McGehee, 35 S. Ct. 718, 237 U. S. 611, 59 L. Ed. 1144 (1914). It was in this case held that they are not required so to do. This case followed Olmsted v. Olmsted, 30 S. Ct. 292, 216 U. S. 386, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292 (1909). Here it was held that the full-faith-and-credit clause does not require the courts of one state to give effect to a statute of another state legitimatizing children born out of wedlock. In the Hood case the court rested its decision on the ground that the Alabama statute of descents, as construed by the Supreme Court of that state, excluded children adopted by proceedings in other states. The Court says, and this is significant, 'Alabama is the sole mistress of the devolution of Alabama land by descent.' * * *"

In conclusion, these respondents submit that the Supreme Court of Illinois in deciding the federal question involved in **Beatrice Fuhrhop v. Gertrude Austin et al.**,

385 Ill. 149, 52 N. E. (2d) 267, as it did, has followed the applicable decisions of this Court and therefore petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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